No. 21-1446

In the United States Court of Appeals for the Second Circuit

STATE OF CONNECTICUT, PLAINTIFF-APPELLEE

v.

EXXON MOBIL CORPORATION, DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT (CIV. NO. 20-1555) (THE HONORABLE JANET C. HALL, J.)

REPLY IN SUPPORT OF MOTION OF APPELLANT FOR A STAY OF THE REMAND ORDER PENDING APPEAL

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The State urges the Court to subject the parties to costly and potentially futile proceedings in Connecticut state court before this Court has addressed ExxonMobil's grounds for federal jurisdiction. But all of the traditional factors support a stay here. ExxonMobil is likely to succeed on its argument that federal jurisdiction lies here, most notably because federal common law governs claims seeking redress for global climate change, as this Court recently held in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021). Contrary to the State's assertions, *City of New York* applies with full force here, because the State expressly seeks redress for injuries allegedly caused by climate change, and the well-pleaded complaint rule presents no bar to removal.

The remaining stay factors tilt in ExxonMobil's favor as well. As for irreparable injury: the State contends that any injury ExxonMobil would suffer from litigating simultaneously in two forums cannot be irreparable, but that is incorrect. And the mere fact that the district court could modify state-court rulings if the remand order is reversed does not alleviate the burden of litigating in two forums. As for balance of the harms: the State does not contend that a stay would burden it, and its argument that a lawsuit alleging violations of the Connecticut Unfair Trade Practices Act (CUTPA) is presumptively in the public interest fails to account for countervailing public interests that heavily favor a stay. The motion for a stay should be granted.

A. ExxonMobil Is Likely To Prevail On Appeal

Where, as here, "the balance of the equities" favors granting the stay, a stay applicant need only show a "substantial case on the merits" and the existence of a "serious legal question" to justify a stay. *LaRouche* v. *Kezer*, 20 F.3d 68, 72-73 (2d Cir. 1994) (citation omitted). ExxonMobil's appeal raises multiple serious legal questions, and the State's contrary arguments are unpersuasive.

1. Removal is proper because ExxonMobil has a serious argument—indeed, a compelling one—that the State's CUTPA claims arise under federal common law. *See* Mot. 7-13. In response, the State argues (Opp. 6-12) both that federal common law does not govern its claims and that the well-pleaded complaint rule prevents removal of those claims. Both arguments lack merit.

a. The State argues that federal common law does not govern its claims because this case is merely "about deceptive statements and marketing." Opp. 7 (emphasis omitted). But the State plainly seeks redress for alleged harms arising from global greenhouse-gas emissions: for example, it demands restitution in the amount of "all expenditures attributable to ExxonMobil that the State has made and will have to make to combat the effects of climate change." D. Ct. Dkt. 1-2, Ex. 12, at 44. As the district court explained at oral argument, that request is "much broader" than "damages flowing from . . . the sale of the product attributable to the deceptive advertising." D. Ct. Dkt. 50, at 8.

Accordingly, ExxonMobil is not "manifest[ing]" a "false complaint." Opp. 7. It is describing the claims for what they are: an attempt to use substantial financial penalties to regulate ExxonMobil's production of fossil-fuel products "far beyond [Connecticut's] borders." *City of New York*, 993 F.3d at 92. These are precisely the sort of "sprawling" claims that this Court recently held extend "beyond the limits of state law." *Id.*

The State contends (Opp. 11) that *City of New York* does not support removal because the Court there treated federal common law as a matter of ordinary preemption and not federal jurisdiction. To be sure, the Court acknowledged decisions holding that federal common law does not support removal. 993 F.3d at 93-94. But the Court did not opine on whether those decisions were correct, because the plaintiff had "filed suit in federal court" on diversity grounds. *Id.* at 94. Those decisions rested on mischaracterizing defendants' federal-common-law argument as presenting a preemption defense. ExxonMobil's argument that federal common law necessarily governs the State's claims is not based on preemption, and the Court's rationale in disposing of the plaintiff's claims in *City of New York*—that they "must be brought under federal common law" because they are "federal claims"—plainly supports removal. *Id.* at 95. After all, "if federal common law exists, it is because state law cannot be used." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 n.7 (1981).

The State also attempts to distinguish *City of New York* on the basis that it involved nuisance and trespass claims, rather than deceptive trade-practices claims. Opp. 11. That is a distinction without a difference. As this Court explained, where a plaintiff is seeking relief from climate-change injuries, the plaintiff cannot use "[a]rtful pleading" to "transform" an action "into anything other than a suit over global greenhouse gas emissions." *City of New York*, 993 F.3d at 91. As was the case in *City of New York*, "[i]t is precisely *because* fossil fuels emit greenhouse gases—which collectively exacerbate global warming—that the [State] is seeking damages." *Id.* (internal quotation marks omitted). The State cannot "disavow[] any intent to address emissions" while "identifying such emissions" as the source of its harm. *Id.* That is true regardless of which tort theory a plaintiff identifies as its means for achieving the relief it seeks.

b. The State next argues that the well-pleaded complaint rule prevents removal here because there is no "facial federal claim in the State's complaint." Opp. 6. But this Court has made clear that a claim pleaded under state law but governed by federal common law is removable to federal court. *See Republic of Philippines* v. *Marcos*, 806 F.2d 344, 354 (2d Cir. 1986). And several other courts of appeals have held that federal jurisdiction exists if federal common law supplies the rule of decision, even if the plaintiff purports to assert only state-law claims. *See, e.g.*, *Sam L. Majors Jewelers* v. *ABX, Inc.*,

117 F.3d 922, 926, 929 (5th Cir. 1997); *In re Otter Tail Power Co.*, 116 F.3d 1207, 1214 (8th Cir. 1997); *Caudill* v. *Blue Cross & Blue Shield of North Carolina, Inc.*, 999 F.2d 74, 77-80 (4th Cir. 1993). Any contrary rule would permit a plaintiff to preclude the federal courts from developing federal common law merely by attaching state-law labels to an inherently federal claim.

As ExxonMobil has explained (Mot. 10-11), the artful-pleading doctrine prevents that peculiar result. In the State's view, however, the artful-pleading doctrine applies in only two circumstances not present here: namely, "complete preemption by federal statute or when a federal statute expressly provides for removal." Opp. 7 (emphasis omitted). But none of the cases cited by the State holds as much. While *Romano* v. *Kazacos*, 609 F.3d 512 (2d Cir. 2010), is consistent with that argument, the Court there was not faced with the question whether the artful-pleading doctrine applies when a plaintiff seeks to label a claim that arises under federal common law as a state-law claim instead. Proving that the State's two categories are not exclusive, the Court has subsequently explained that the artful-pleading doctrine also applies when "the vindication of a state law right necessarily turns on a question of federal law"—as the State necessarily admits (Opp. 8 n.3). *Fracasse* v. *People's United Bank*, 747 F.3d 141, 144 (2d Cir. 2014). Because those cases do not address the question whether the doctrine applies to a claim pleaded under state law

but necessarily governed by federal common law, they do not foreclose its application here.

The Supreme Court's decision in *Beneficial National Bank* v. *Anderson*, 539 U.S. 1 (2003), also does not aid the State. *See* Opp. 7-8. To the contrary, the Court there recognized that it had previously permitted the exercise of federal jurisdiction over an Indian tribe's state-law possessory-land claims because the claims were necessarily governed by federal common law. *See* 539 U.S. at 8 n.4 (citing *Oneida County* v. *Oneida Indian Nation*, 470 U.S. 226, 236 (1985) (holding that an "action for violation of [a tribe's] possessory rights" may proceed "based on federal common law")).

In passing, the State suggests (Opp. 7 n.2) that ExxonMobil did not invoke the artful-pleading doctrine in its briefing below. That is incorrect. ExxonMobil argued, *inter alia*, that "it is the inherently federal *nature* of the claims stated in the [c]omplaint, and not the plaintiff's artful pleading, that controls," D. Ct. Dkt. 37, at 1, and that "a plaintiff cannot block removal by attempting to disguise [an] inherently federal cause of action," *id.* at 17 (internal quotation marks and citation omitted).

2. This case belongs in federal court for the additional reason that it necessarily raises disputed and substantial federal issues. *See* Mot. 13-15; *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005). The State does not dispute that, to the extent its

claims arise under federal common law, *Grable* would provide an independent basis for federal jurisdiction. *See* Mot. 14. And given that CUTPA requires a court to ask if ExxonMobil's conduct violates "public policy," is "unscrupulous," or causes "substantial injury," *Updike, Kelly & Spellacy, P.C.* v. *Beckett*, 850 A.2d 145, 172-173 (Conn. 2004), *see* Opp. 13, the court will necessarily confront the many actions taken by federal actors regarding the balance between energy production and environmental protection. *See* D. Ct. Dkt. 1, at 33-46 (explaining the history of federal control of the oil-and-gas industry). While the Ninth Circuit declined to permit removal based on those decisions by the federal government, *see City of Oakland* v. *BP p.l.c.*, 969 F.3d 895 (9th Cir. 2020), *cert. denied*, No. 20-1089, 2021 WL 2405350 (June 14, 2021), Opp. 13, other courts have exercised federal jurisdiction over claims that, like those here, "directly implicate[] actions taken by [federal agencies] in approving the creation of [federal programs] and the rules governing [them]." *Pet Quarters, Inc.* v. *Depository Trust & Clearing Corp.*, 559 F.3d 772, 779 (8th Cir. 2009).

3. Jurisdiction also exists under the federal-officer removal statute, 28 U.S.C. § 1442(a). *See* Mot. 15-17. Contrary to the State's assertion, the district court did not hold that ExxonMobil failed to show that its actions were "related to the work of the federal government." Opp. 15. The court determined only that there was an insufficient nexus between the State's claims and ExxonMobil's actions taken at the direction of federal officers. *See* Mot.

App. 25a. In so doing, however, the district court required ExxonMobil to show a but-for connection between the claims and the relevant conduct—a result consistent with *Isaacson* v. *Dow Chemical Co.*, 517 F.3d 129 (2d Cir. 2008), but inconsistent with Congress's subsequent amendments to the federal-officer removal statute in 2011. *See* Mot. 16-17.

The State notes that this Court has "reiterated *Isaacson*'s standards after 2011." Opp. 15. But neither of the cases it cites addresses the effect of the 2011 amendments on *Isaacson*'s holding—an unsurprising fact, given that the parties in those cases did not raise that issue in their briefing. *See Agyin* v. *Razmzan*, 986 F.3d 168 (2d Cir. 2021); *Veneruso* v. *Mount Vernon Neighborhood Health Center*, 586 Fed. Appx. 604 (2d Cir. 2014) (summary order). The State may find ExxonMobil's argument "hard to credit," Opp. 15, but several courts of appeals have agreed with it, and none has disagreed. *See* Mot. 16 (citing cases). Because the State's claims are "related to" ExxonMobil's actions taken under federal direction, removal on federal-officer grounds was proper.

4. Finally, this case was removable under the Outer Continental Shelf Lands Act. *See* 43 U.S.C. § 1349(b)(1). The State argues that removal was improper on this basis because ExxonMobil's action on the outer continental shelf did not "cause[] the injur[ies]" alleged here. Opp. 16. But that

statute permits federal jurisdiction over any claims "arising out of, *or in connection with*" any operation conducted on the outer continental shelf. 43 U.S.C. § 1349(b)(1) (emphasis added). That language does not mandate a causal connection. *Cf. Ford Motor Co.* v. *Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1026 (2021) (holding, for purposes of specific personal jurisdiction, that no causal connection is necessary to show that claims "arise out of *or relate to* [a] defendant's contacts with the forum").

B. ExxonMobil Will Suffer Irreparable Harm Absent A Stay

The State cannot dispute that ExxonMobil will incur significant costs from having to litigate before this Court and in Connecticut state court at the same time. Instead, the State argues that litigation costs cannot constitute "irreparable harm." Opp. 20-21. That is incorrect. There is "no categorical rule that time and money spent in litigation can never constitute an irreparable harm." *Richards* v. *Ernst & Young LLP*, Civ. No. 08-4988, 2012 WL 92738, at *3 (N.D. Cal. Jan. 11, 2012). And the State does not contend that ExxonMobil is likely to recover its litigation costs if it prevails. *Cf. Philip Morris USA Inc.* v. *Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers) (stating that, where "expenditures cannot be recouped, the resulting loss may be irreparable").

The State next argues that, under 28 U.S.C. § 1450, a district court may "dissolve or modify injunctions, orders, and all other proceedings had in state court prior to removal." Opp. 22. But it is not clear that proceedings occurring

after remand but before this Court reverses the remand order would qualify as proceedings "prior to" removal under the statute. 28 U.S.C. § 1450. And even if they do, the statute would prove precisely why a stay is warranted: the time and money spent on proceedings in state court could be for naught.

The State also submits that "jurisdictional challenges freeze all further activity in a case" in Connecticut state court. Opp. 23. But here, the cost of litigating that jurisdictional challenge could very well be significant, and the district court would of course be called upon to evaluate the correctness of any state-court decision if this Court vacates the remand order. This Court can avoid the need for such costly state-court proceedings in the first place by granting a stay.

C. The Balance Of Harms Favors ExxonMobil

Finally, the balance of the harms weighs heavily in ExxonMobil's favor. The State makes no effort to argue that it will be harmed by a stay, and "the outcome of this lawsuit cannot turn back the clock on the atmospheric and ecological processes that [ExxonMobil's] activities have allegedly helped set in motion." *City of Annapolis* v. *BP p.l.c.*, Civ. No. 21-772, 2021 WL 2000469, at *4 (D. Md. May 19, 2021). Instead, the State merely argues it has a "strong interest in timely and expeditious enforcement of its protective statutory scheme." Opp. 24. But entering a stay now would conserve public resources by avoiding potentially unnecessary proceedings in state court and the "rat's

nest of comity and federalism issues" the district court would face should the case return there. *Northrop Grumman Technical Services* v. *Dyncorp International LLC*, Civ. No. 16-534, 2016 WL 3346349, at *4 (E.D. Va. June 16, 2016). This Court's decision in *New York* v. *Actavis PLC*, 787 F.3d 638 (2015), does not require a different result; the parties there did "not dispute[] that the preliminary injunction" at issue "serve[d] the public's interest." *Id.* at 662.

* * * * *

The motion to stay execution of the remand order pending appeal should be granted.

Respectfully submitted,

/s/ Kannon K. Shanmugam

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JULY 2, 2021

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, counsel for appellant Exxon Mobil Corporation and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 27(d)(2)(A), that the foregoing Reply in Support of Motion of Appellant for a Stay of the Remand Order Pending Appeal is proportionately spaced, has a typeface of 14 points or more, and contains 2,542 words.

JULY 2, 2021

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for appellant Exxon Mobil Corporation and a member of the bar of this Court, certify that, on July 2, 2021, the attached Reply in Support of Motion of Appellant for a Stay of the Remand Order Pending Appeal was filed through the Court's electronic filing system. I certify that all participants in the case are registered users with the electronic filing system and that service will be accomplished by that system.

JULY 2, 2021

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM